PENGANGKUTAN UFO SDN BHD v. HAP SENG CREDIT SDN BHD & ORS

HIGH COURT MALAYA, TAIPING
NOOR RUWENA MD NURDIN JC
[ORIGINATING SUMMONS NO: AB-28-JM-1-03-2022]
31 JANUARY 2023

Abstract – *Judicial management is initiated by an application to the court for the appointment of a judicial manager, who must be an independent insolvency practitioner. In view of the drastic effect of making a judicial management order in relation to an insolvent company, which may have no prospect of recovering money or assets within a reasonable time, the court's consideration at all stages must be based on strict proof and evidence, and not merely surmise and conjecture, to ensure creditors are not defrauded by sympathy evoking stories of insolvent companies. The court must be satisfied that the application and the proposal were made bona fide by an applicant.*

COMPANY LAW: *Business and schemes – Judicial management order – Application under s. 405 of Companies Act 2016 – Whether company proven to be unable to pay debts – Whether there was reasonable probability of rehabilitating company – Whether sufficient details of company restructuring presented – Whether proposal on ways to achieving goals provided by nominated judicial manager – Whether application approved by secured creditors – Whether merely attempt to deny creditors' right to pending legal actions – Whether application allowed – Companies Act 2016, ss. 366, 405(1)(b) & 409*

The applicant was a company involved in businesses relating to transportation services, warehousing and storage as well as general trading with a total paid-up capital of RM7,000,000. Enclosure 1 was the applicant's *ex parte* originating summons ('OS') for the appointment of a judicial manager ('JM') and a judicial management order ('JMO') in respect of the applicant's proposed restructuring and other affairs pursuant to s. 405 of the Companies Act 2016 ('CA'). The interveners, the applicant's creditors who had filed various suits against the applicant, were granted leave to intervene in the proceedings *vide* the court's order. There were approximately 23 suits as at the date of the filing of the OS, to recover the debts owed and a winding-up petition, which had to be put on hold pending the decision of this application. The interveners contended that the application was not made *bona fide* and it was filed merely to delay the legal actions the applicant was facing.

Held (dismissing application with costs):

(1) Pursuant to s. 404 of the CA, an application for a JMO may be made to the court when the applicant is considered as a company which will be unable to pay its debts and there is a reasonable probability of

rehabilitating the company or preserving all or part of its business as a going concern or that otherwise where the interests of creditors would be better served than by resorting to a winding up. In considering the JMO, the order may be allowed if the court considers that the making of the order would be likely to achieve one or more of the purposes in s. 405(1)(b) which is to be read with s. 366 of the CA, namely, securing the approval under s. 366 of a compromise or arrangement between the company and any such persons as are mentioned in that section wherein if the compromise or arrangement is agreed by a majority of 75% of the total value of the creditors. (paras 6 & 11)

(2) The applicant had not proved, on a balance of probabilities, that it had met the requirements of s. 405(1) of the CA. The unaudited financial statement submitted by the applicant was too brief and general and there was no breakdown of the figures for the court to analyse. It is not enough to state that it had satisfied the provision of s. 405(1) without more by just making a sweeping statement of its inability to pay off its debt and then try to obtain the court's protection from the legal suits it was facing. Parts (a) and (b) are to be read disjunctively by the court in determining whether the requirements of s. 405(1) has been met. Unfortunately, without more details of the applicant's restructuring, the company had not been able to show not even one of the three limbs in s. 405(1)(b) to enable the court to exercise its power judiciously in its favour. (paras 25, 26 & 31)

(3) The court, in considering whether the proposal was likely to achieve survival and/or better realisation, would have to rely on the nominated JM's expertise for guidance. Although there was already a proposed JM named in the application, there was no affidavit or an expert report exhibited by the proposed JM and therefore, there was no satisfactory explanation on the rationale of the averments by the applicant and how it would achieve the goals. Even the pre-conditions for making the application – that the applicant considered there was a reasonable probability of achieving the goals – was questionable. In these circumstances, the evidence adduced fell far short of what it would take to persuade this court to allow the application to issue a JMO. (para 33)

(4) The definition of a 'secured creditor' under s. 2 of the Insolvency Act 1967 was applicable to the CA. Therefore, the applicant's argument that the interveners were not secured creditors at this late stage of the proceedings did not hold water. This stand was taken purely to block the 'veto' of secured creditors as provided for under s. 409 of the CA and delay the proceedings in the 23 civil suits filed earlier. Having considered the submissions and the documents, the interveners were held to be secured creditors, except AmBank Islamic, and therefore

there is no discretion under the law that the application could be allowed. Further, there was nothing special about the applicant company, which was an ordinary transportation company. Loss of employment was not a public interest consideration. (paras 38 & 43)

Case(s) referred to:
Alam Teknokrat Sdn Bhd v. Affin Islamic Bank Bhd [2022] 1 LNS 2190 HC ***(refd)***
Asia Commercial Finance (M) Bhd v. JB Precision Moulding Industries Sdn Bhd (In Liquidation) [1996] 2 CLJ 547 FC ***(refd)***
Federal Power Sdn Bhd v. Dara Consultant Sdn Bhd [2021] 1 LNS 1851 HC ***(refd)***
Goldpage Assets Sdn Bhd v. Gan Kam Seng & Ors [2020] 1 LNS 2283 HC ***(refd)***
In Re Biaxis (M) Sdn Bhd [2020] 1 LNS 1289 HC ***(foll)***
Leadmont Development Sdn Bhd v. Infra Segi Sdn Bhd & Another Case [2018] 10 CLJ 412 HC ***(refd)***
M Hashimi Ibrahim v. Asia Commercial Finance (M) Bhd [2002] 5 CLJ 25 HC ***(refd)***
Re Bintan Lagoon [2005] SGHC 151 ***(refd)***
Re Harris Simons Construction Ltd [1989] BCLC 202 ***(refd)***
Re Mohamad Supardi Md Noor; ex p Public Finance Bhd [2004] 4 CLJ 646 HC ***(refd)***
Spacious Glory Sdn Bhd v. Coconut Three Sdn Bhd [2020] 1 LNS 1617 HC ***(refd)***
Syed Ibrahim & Co v. Trans Fame Offshore Sdn Bhd & Ors [2022] 1 LNS 1412 HC ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, s. 2
Companies Act 2016, ss. 366, 404, 405(1)(b), (5)(a), 406, 408(1)(b)(ii), 409(b), 420
Insolvency Act 1986 [UK], s. 8

For the applicant - Teo Jeng Yu; M/s Prem & Assocs
For the interveners - William YB Soon (representing Hap Seng Credit Sdn Bhd); M/s Sidek, Teoh, Wong & Dennis
Mohd Khairul Azri (representing Affin Bank Berhad); M/s S Ravichandran & Anura
Effa Farida Nor Azizi (representing Orix Credit Malaysia Sdn Bhd); M/s BH Koh, Soong, Zarin & Partners
Sathees Kumar Govindan & Shahrir Abdul Karim (representing (i) Ambank (M) Bhd; (ii) Ambank Islamic Bhd); M/s Lalchand & Nawawi
Sukhvinder Singh (representing RHB Bank Bhd); M/s Rajandran, Domnic & Co

Reported by S Barathi

JUDGMENT

Noor Ruwena Md Nurdin JC:

Background

[1] The applicant is a company involved in business relating to transportation services, warehousing and storage as well as general trading with a total paid-up capital of RM7,000,000. It has applied in the encl. 1 which was an *ex parte* originating summons dated 10 March 2022 ("the OS")

for the appointment of a judicial manager ("the JM") and a judicial management order ("JMO") in respect of the applicant's proposed restructuring and other affairs pursuant to s. 405 of the Companies Act 2016.

[2] The interveners in this case were granted leave to intervene in the proceedings *vide* the court's order dated 8 August 2022. Earlier there were seven proposed interveners but one of them, DKSH Malaysia Sdn Bhd, withdrew its application before the hearing date for that application was fixed. The successful interveners were Hap Seng Credit Sdn Bhd ("Hap Seng"), Affin Bank Berhad ("Affin Bank"), Orix Credit Malaysia Sdn Bhd ("Orix Credit"), AmBank (M) Berhad ("AmBank"), AmBank Islamic Berhad ("AmBank Islamic") and RHB Bank Berhad ("RHB Bank"). Three of the interveners had also filed applications to recover equipment, machineries, vehicles and properties from the applicant under this suit in encl. 33 (Orix Credit), encl. 38 (Hap Seng) and encl. 40 (RHB Bank). These were subsequently withdrawn with no order as to costs after encl. 1 was decided on 17 November 2022 and resulted in the dismissal of the applicant's application for a JMO.

[3] Undoubtedly, the applicant did not pay off its debts to its creditors, and the six interveners were just some of the applicant's creditors who had filed various suits against the applicant in the lower courts in Taiping, Butterworth. Kuala Lumpur and Shah Alam, as well as the High Courts in Pulau Pinang, Taiping and Shah Alam. There were approximately 23 suits at the date of the filing of the OS to recover the debts owed and a winding-up petition which had to be put on hold pending the decision of this application.

Application For A Judicial Management Order

[4] Enclosure 1 was heard on 11 October 2022 in the presence of all the parties to the suit. The prayers sought by the applicant in encl. 1 were as follows:

1. Pengangkutan UFO Sdn. Bhd., Pemohon, diletakkan di bawah pengurusan kehakiman oleh seorang pengurus kehakiman menurut suatu perintah Mahkamah menurut Seksyen 405 Akta Syarikat 2016 bagi tempoh enam (6) bulan dari tarikh perintah ini;

2. Dato' Dr. Shanmughanathan a/l Vellanthurai (K/P No.: 660204-71-XXXX) (Lesen No.: 01870/01/2022P) dilantik sebagai pengurus kehakiman Pemohon ("Pengurus Kehakiman");

3. Sepanjang tempoh perintah ini, semua hal ehwal, perniagaan dan harta Pemohon dikendalikan oleh Pengurus Kehakiman yang dilantik oleh Mahkamah yang Mulia ini, dan Pengurus Kehakiman diberikan kuasa untuk memasuki dan melaksanakan apa-apa dokumen yang diperlukan untuk tujuan ini;

4. Pengurus Kehakiman diberikan kuasa menjalankan semua kuasa dan hak seorang pengurus kehakiman sepertimana yang diperuntukkan dalam Akta Syarikat 2016, Jadual Sembilan Akta Syarikat 2016 dan Kaedah-kaedah Syarikat (Mekanisme Penyelamat Korporat) 2018 dan semua hak pengarah Pemohon sepertimana yang diberikan dalam Akta Syarikat 2016 dan/atau memorandum dan artikel persatuan Pemohon, atau undang-undang lain yang terpakai;

5. Pengurus Kehakiman diberikan kuasa untuk memulakan, meneruskan dan/atau menamatkan mana-mana prosiding undang-undang dan untuk tujuan ini diberikan kuasa untuk melantik dan mengarahkan peguamcara dan peguambela;

6. Suatu moratorium diberikan menurut seksyen 411 bagi Akta Syarikat 2016 termasuk terhadap permulaan atau kesinambungan mana-mana dan semua prosiding undang-undang atau pengambilan apa-apa langkah dalam prosiding berikut:

   6.1. apa-apa prosiding dalam Mahkamah Perusahaan dan/atau Mahkamah Buruh;

   6.2. apa-apa prosiding timbang tara;

   6.3. apa-apa prosiding pelaksanaan hak debentur termasuk pelantikan pengurus dan penerima;

   6.4. apa-apa prosiding di bawah Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012; dan/atau

   6.5. apa-apa prosiding dan tindakan penguatkuasaan termasuk prosiding garnishee dan menahan;

7. Apa-apa permohonan untuk penggulungan Pemohon ditolak;

8. Pengurus Kehakiman diberikan kebebasan untuk membuat permohonan untuk melanjutkan tempoh perintah ini;

9. Pemohon dan/atau Pengurus Kehakiman diberikan kebebasan untuk membuat permohonan kepada Mahkamah yang Mulia ini untuk perintah dan/atau relit selanjutnya;

10. Kos permohonan Pengurus Kehakiman akan disifatkan sebahagian kos dan perbelanjaan pengurusan kehakiman Pemohon dan dibayar daripada aset-aset Pemohon; dan

11. Apa-apa perintah lain atau selanjutnya yang difikirkan sesuai dan adil oleh Mahkamah yang Mulia ini.

[5] The court has taken the liberty for ease of reference to reproduce from the applicant's written submission the list of cause papers pertaining to the application for a JMO as follows:

(i) originating summons dated 10 March 2022 ("OS") encl. 1;

(ii) affidavit in support affirmed by Gurmak Singh a/l Narian Singh on 10 March 2022 ("applicant's AIS") encl. 2;

A (iii) affidavit in reply affirmed by Tay Yow Hong on 11 April 2022 ("Hap Seng's AIR") encl. 9;

(iv) affidavit in reply affirmed by Hairul Azli bin Abd Aziz on 20 April 2022 ("Affin Bank's AIR") encl. 18;

B (v) affidavit in reply affirmed by Lee Ban Teik on 26 May 2022 ("Orix Credit's AIR") encl. 31;

(vi) affidavit in reply affirmed by Arifin bin Saaid and Nor Elianty binti Abdullah on 18 August 2022 ("Ambank's AIR") encl. 62;

C (vii) affidavit in reply affirmed by Arifin bin Saaid and Nor Elianty binti Abdullah on 18 August 2022 ("Ambank Islamic's AIR") encl. 63;

(viii) affidavit in reply affirmed by Zeety binti Othman on 22 August 2022 ("RHB's AIR") encl. 66;

(ix) affidavit in reply affirmed by Gurmak Singh a/l Narian Singh on
D 14 September 2022 to Affin Bank's AIR ("applicant's AIR") encl. 70;

(x) affidavit in reply affirmed by Gurmak Singh a/l Narian Singh on 14 September 2022 to Ambank (M) Berhad's AIR ("applicant's AIR") encl. 71;

E (xi) affidavit in reply affirmed by Gurmak Singh a/l Narian Singh on 14 September 2022 to Ambank Islamic's AIR ("applicant's AIR") encl. 72;

(xii) affidavit in reply affirmed by Gurmak Singh a/l Narian Singh on 14 September 2022 to Hap Seng's AIR ("applicant's AIR") encl. 73;

F (xiii) affidavit in reply affirmed by Gurmak Singh a/l Narian Singh on 14 September 2022 to Orix Credit's AIR ("applicant's AIR") encl. 74; and

(xiv) affidavit in reply affirmed by Gurmak Singh a/l Narian Singh on
G 14 September 2022 to RHB's AIR ("applicant's AIR") encl. 75.

[6] Judicial management is initiated by an application to the court for the appointment of a JM who must be an independent insolvency practitioner. Pursuant to s. 404 of the Companies Act 2016 ("the 2016 Act"), an application for a JMO may be made to the court when the applicant is
H considered as a company which will be unable to pay its debts and there is a reasonable probability of rehabilitating the company or preserving all or part of its business as a going concern or that otherwise where the interests of creditors would be better served than by resorting to a winding up. A JMO shall remain in force for a period of six months from the date of the making
I of the order, unless the judicial management is otherwise discharged, but the court may, on the application of a JM, extend this period for another six

months subject to such terms as the court may impose. Under the law, if the nomination of the JM is approved by the court, the JM has 180 days to come up with a scheme or proposal to be presented to the company's creditors and the approval of the creditors towards the scheme must be obtained.

[7] It was submitted that the applicant had satisfied and complied with the requirements as set out in s. 405 of the 2016 Act to be placed under a JMO, the reasons for such an application, *inter alia*, were that:

(i) the applicant was unable to pay its debts;

(ii) there was a reasonable probability of rehabilitating the applicant;

(iii) winding-up of the applicant will not benefit its creditors.

[8] The court is equipped with the following powers when considering whether to an application for a JMO under s. 405(1) of the 2016 Act if:

(i) the court is satisfied that the company is or will be unable to pay its debts; and

(ii) the court considers that the making of the order would be likely to achieve one or more of the following purposes:

(a) the survival of the company, or the whole or part of its undertaking as a going concern;

(b) the approval under s. 366 of a compromise or arrangement between the company and any such persons as are mentioned in that section;

(c) a more advantageous realisation of the company's assets would be effected than on a winding up.

[9] The Act further provides in s. 405 that:

(2) Upon hearing the application for a judicial management order, the court may dismiss the application or adjourn the hearing conditionally or unconditionally or make an interim order or any other order that the court thinks fit.

(3) Any judicial management order made under sub-s. (1) shall direct that during the period in which the order is in force, the affairs, business and property of the company shall be managed by a judicial manager appointed by the court.

(4) The costs and expenses of any unsuccessful application for a judicial management order made under this section shall, unless the court otherwise orders, be borne by the applicant and, if the court considers that the application is frivolous or vexatious, the court may make such orders to redress any injustice that may have resulted as the court thinks just and equitable.

(5) Nothing in this section shall preclude a court:

A (i) from making a judicial management order and appointing a judicial manager if the court considers the public interest so requires; or

(ii) from appointing, after the making of an application for a judicial management order and on the application of the person applying for the judicial management order, an interim judicial manager, pending the making of a judicial management order, and such interim judicial manager may be the person nominated in the application and may exercise such functions, powers and duties as the court may specify in the interim order.

C **[10]** Section 409 provides that subject to sub-s. 405(5), the court shall dismiss an application for a judicial management order if it is satisfied that:

(i) a receiver or receiver and manager referred to in sub-para. 408(1)(b)(ii) has been or will be appointed; and

(ii) the making of the order is opposed by a secured creditor.

D **[11]** Coming back to s. 405(1)(b), it provides that in considering the JMO, the order may be allowed if the court considers that the making of the order would be likely to achieve one or more of the purposes in the said section which is to be read with s. 366 of the 2016 Act namely, securing the approval under s. 366 of a compromise or arrangement between the company and any such persons as are mentioned in that section wherein if the compromise or arrangement is agreed by a majority of 75% of the total value of the creditors.

[12] Meanwhile, the interveners collectively and similarly opposed the application for a JMO on the following grounds:

F (i) the application was opposed by secured creditors;

(ii) no public interest requirement;

(iii) failure to meet the requirements of s. 405(1) of the 2016 Act such as an affidavit in support of the application filed by an insolvency expert and an expert's report on the details of how the debts would be resolved; and

G (iv) the application was not made *bona fide* as it was merely an attempt to deny the creditors' right to legal action that they had already filed in various courts.

H **Evaluation And Findings Of The Court**

[13] The court has perused the numerous cause papers, written submissions and authorities cited in support of and against the application. On 17 November 2022 the court dismissed the application. Needless to say, the court concurs with the arguments put forth by counsels for the interveners.

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[14] Counsel for the applicant submitted on the case of *Re Harris Simons Construction Ltd* [1989] BCLC 202 in relation to s. 8 of the Insolvency Act 1986 whereby Hoffman J held that: A

> Second, the section requires the court to be 'satisfied' of the company's actual or likely insolvency but only to 'consider' that the order would be likely to achieve one of the stated purposes. There must have been a reason for this change of language and I think it was to indicate that a lower threshold of persuasion was needed in the latter case than the former. B

It was urged that if the court was satisfied with the first criteria that the company was unable to pay its debt, the applicant would then be required to convince the court of any of the criteria in s. 405(1)(b). The court merely needed to "consider" that there was a "real prospect" that one of the outcomes set out in the subsection was achievable as discussed in the case of *Re Harris Simons* (*supra*). C

[15] He continued that with regard to s. 405(1)(b) of the 2016 Act, the word "likely" had been used and in the case of *Spacious Glory Sdn Bhd v. Coconut Three Sdn Bhd* [2020] 1 LNS 1617 where this court had given its consideration when deciding whether the making of the JMO was likely to achieve one or more of the purposes as stated therein with the following view: D E

> [28] The term 'likely' has not been defined in the Companies Act 2016 but the term 'likely' has been held in the UK in the case of *Re AA Mutual International Insurance Co Ltd* [2004] EWHC 2430 (Ch) to mean the applicant to demonstrate on a balance of probabilities that it is 'more probable than not' that this criterion will be fulfilled. I respectfully adopt the same definition for the purposes of defining the term 'likely' under s. 405 of the Companies Act 2016. F

[16] The applicant submitted there was no dispute that it was unable to pay off all its debts to the creditors as can be seen in the applicant's AIS, encl. 2 where it listed the suits against the applicant. Therefore, based on the list of suits filed against it, the applicant claimed that it had satisfied the requirements of s. 405(1). G

[17] The court then needed to consider whether there was a reasonable probability for the applicant to be rehabilitated. Relying on the income statement from 1 January 2022 to 30 July 2022 (for example, refer to encl. 75 of exh. G3), it was submitted that the statement clearly showed the applicant's monthly revenue was increasing from RM436,975.32 in January 2022 until July 2022 when it reached RM3,764,887.05. (refer to exh. G2, encl. 70; exh. G1, encl. 71; exh. G1, encl. 72; exh. G3, encl. 73; exh. G2, encl. 74; exh. G3, encl. 75). Apart from the revenue from cargo and transportation, the applicant was also getting income from rental of lorries and also warehouse which have generated a sum of RM164,018.40 in July H I

2022 when compared to January 2022. Then there were also assets of the company worth approximately RM21,037,931.01 where some of them were still under loan. Nevertheless, arguably these assets could still be utilised to generate income subject to the experience and the skills of the JM to formulate a viable statement of proposal and to discuss with all the creditors including the interveners, (refer to exh. G6, encl. 2). Due to the applicant still generating income every month and running the business operation, it was submitted that the applicant should be given an opportunity to rehabilitate the company by placing it under a JM appointed by the court.

[18] It was admitted by the applicant that Affin Bank had filed a winding up petition against the applicant. Counsel submitted that this would not be favourable to all the creditors since the assets of the applicant will be forced to be sold and would inevitably make the price of the assets lower than the true market value. Hence, it would definitely prejudice and affect the interest of the creditors. Moreover, arguably judicial management is more efficient and faster than the adjudication process in winding up as the 2016 Act has clearly stipulated the timeline for the JM to achieve the goal within six months or not more than 12 months. However, it has come to the court's attention that the winding up matter is being stayed pending another judicial management application by the applicant in the Ipoh High Court (Case No: AA-28JM-1-03-2022), after this application was dismissed on 17 November 2022. Hence, all efforts to obtain a JMO in other courts by the applicant would inevitably delay the winding up proceedings against it. It cannot be said then that a JMO in that regard is a faster process to resolve the problem. No doubt that the said application pending in the Ipoh High Court was only filed after this case was decided. But what is the intention of the applicant in filing the second JM application when time is of the essence.

[19] Having said that, the interveners also contended that the application was not made *bona fide* and it was filed merely to delay the legal actions the applicant was facing in the various courts as stated in encl. 2. The case of *In Re Biaxis (M) Sdn Bhd* [2020] 1 LNS 1289; [2020] 7 MLJ 443, referring to *Leadmont Development Sdn Bhd v. Infra Segi Sdn Bhd & Another Case* [2018] 10 CLJ 412; [2019] 8 MLJ 473, reiterated that first and foremost the court must be satisfied that the application and proposal were made *bona fide* by an applicant. The court there held that if the application was frivolous or vexatious, it may make such orders to redress an injustice that may have been resulted as the court thinks just and equitable. Clearly there are 23 civil suits filed against the applicant at the date of filing of encls. 1 and 2 and a winding up petition is now pending. The applicant allegedly did not file any affidavit to prove that the advertisement of the JMO application was made or that it had given the requisite notice in regard to the application for a JMO to the Registrar of the Companies Commission Malaysia: *Leadmont Development Sdn Bhd v. Infra Segi Sdn Bhd & Another Case* [2018] 10 CLJ 412; [2019] 8 MLJ

473. Moreover, the applicant did not inform the creditors of its intention to file the action for the appointment of a JM. Here, the creditors/interveners all opposed the application. Therefore, it is submitted there is unlikelihood of achieving the support of majority of the shareholders of 75% as required by law.

[20] The interveners argued further, that without any viable statement of proposal filed in support of its application, the JMO application was an abuse of the court process to evade paying its debts to the creditors, and it was not so much of appointing a JM to resolve its debts. The court agrees with their submission as it must be borne in mind again that s. 406 of the 2016 Act provides that a JMO is granted for a duration of six months and may be extended for another six months upon the JM's application to the court to extend the order. The court noted that in the case of *Syed Ibrahim & Co v. Trans Fame Offshore Sdn Bhd & Ors* [2022] 1 LNS 1412; [2022] MLJU 1380 the court granted a second JMO to the applicant after the expiry of the first JMO, after 12 months, upon a fresh application by the court appointed JM.

[21] The facts of the case may be peculiar on its own where the statement of proposal proposed a repayment plan to creditors in three tranches, whereby two tranches were at the time of proposal, expected to be received during the term of the JMO, and the first tranche was fixed at a 10% pay out and the same has been fulfilled. The second tranche and third tranche distributions were yet to be determined and would be contingent upon the probability of recovery of funds and/or claimable losses from contract claims, project owners and third parties who caused losses to Transfame Offshore. That decision showed that an applicant company may be placed under a JMO for more than the duration of six months plus six months as provided under the law upon a fresh application being made. In the present case, the JMO sought was still at the early stages whereas the civil suits against the applicant commenced in 2020 and 2021. So when will it all end for the creditors whom are legitimately pursuing their actions in the various courts if this application is allowed and further extended?

[22] In regard to the contention by the interveners that the current application (encl. 1) was defective as there was no statement of proposal and an affidavit affirmed by the proposed JM, counsel submitted this argument was misconceived as there was no requirement under the 2016 Act that a statement of proposal shall be provided when making an application for a JMO. Instead, s. 420 of the 2016 Act provides that "Where a judicial management order has been made, the judicial manager shall, within sixty days or such longer period as the court may allow, after the making of the order (a) send a statement of his proposal for achieving one or more of the purposes mentioned in para. 405(1)(b) to the Registrar and to alt creditors to their last known address ..."

[23] On the other hand, in the recent case of *Federal Power Sdn Bhd v. Dara Consultant Sdn Bhd* [2021] 1 LNS 1851; [2022] 7 MLJ 563 the learned High Court Judge held that:

> [23] I also agree with the applicant's counsel that the actual recovery plan is to be properly and comprehensively prepared by the proposed judicial obtaining the judicial management order (JMO).

Therefore, it was submitted that it was impossible for the proposed JM to make any proposal and/or expert report without him being officially appointed. It was submitted further that upon obtaining the JMO, and upon the nomination of JM, the JM has only the right to get a copy of statement of affairs from the company and until that time, the JM can only analyse, examine the assets and liabilities of the company before formulating statement of proposal to the creditors. Here, in encl. 2, details of the proposed JM had been circulated, namely one Dato' Dr Shanmughanathan a/l Vellanthurai (K/P No: 660204-71-5037) (Lesen No: 01870/01/2022P) of SC Corporate Recovery Sdn Bhd (Pendaftaran No: 558569-D) had agreed to act if he was appointed.

[24] The *Biaxis Case* was heavily relied on by the interveners on this issue. The learned Judicial Commissioner in that case held:

> [12] Running through the whole judicia! management process from the filing of the application, to the hearing of the application and to the voting on the proposal, is the substantive consideration. *Although the substantive consideration culminates in the statement of the proposal from the judicial manager to the creditors to vote on (s. 420(1) of the CA), they would have been formulated much earlier – at the preparation stage of the application.*
>
> **Expert Advisor/Nominated Judicial Manager**
>
> [13] The applicant would not have been able come up with the proposal and consider that there Is a reasonable probability of the company's survival or better realisation on their own. *They would have engaged an insolvency practitioner – a professional with expertise in corporate insolvency – to come up with and advise them on the proposal from the very outset. The applicant would invariably nominate the same insolvency practitioner to be appointed as judicial manager.*
>
> [14] I am of the firm opinion that the application should also be supported by the nominated judicial manager for the following reasons: (a) he is the mastermind behind the proposal and ploys a key role throughout the judicial management process; (b) he has the expertise to consider whether the proposal will achieve survival and/or better realisation; (c) he is able to provide an objective view, being a professional without any vested interest in the applicant or company; and (d) for as much as it is applicant's application for a judicial management order, it is also his application *albeit* indirectly to be appointed judicial manager.

> [15] *To this end, I think it incumbent on him to affirm an affidavit to support the application. At the very least (though not encouraged), he should prepare an expert report to support the application, to be appended to the applicant's affidavit.*
> (emphasis added)

[25] Although it was a case decided by another High Court, this court has perused the case and found that the learned Judicial Commissioner had discussed the mechanism of judicial management extensively, being a new mechanism under the new Companies Act 2016, and therein had laid down some useful guidelines for other courts to consider. In the *Federal Power Case* the learned High Court Judge held that the actual recovery plan was to be properly and comprehensively prepared by the proposed JM upon obtaining the JMO. Nevertheless, it is noted that the learned High Court Judge did not overrule the view of the learned Judicial Commissioner in *Biaxis Case* on the issue of the statement of proposal and added that such a plan was not absolutely necessary but "that such an affidavit would of course be of immense assistance to the court to assess the viability of any proposals put forth to the court." Therefore, the two cases are still applicable and it is open to this court to follow either decision, depending on the facts of the case as appropriate. On this issue, although this court agrees that the statement of proposal is not a requirement under the 2016 Act or the Corporate Rescue Mechanism Rules 2018, nevertheless, the court is inclined to follow the view in *Biaxis Case* where upon a perusal of the affidavits in this application the court is not satisfied that the applicant had proved on a balance of probabilities that it had met the requirements of s. 405(1) of the 2016 Act.

[26] On this issue of whether the applicant had met the requirements of s. 405(1), it was submitted that the income for six months in the first half of the year 2022 showed promising results. On the other hand, the interveners submitted that the RM3 million income was accumulated and not for one month's income. This was where the court noted that a statement of proposal and/or an affidavit affirmed by the proposed JM would be of immense assistance to the court in making its assessment. As the standard is on a balance of probabilities which the applicant has to prove, based on the financial statement in exh. G3 of encl. 75 (for instance), which was not even an audited financial statement, the court viewed it was too brief and general, and there was no breakdown of the figures for the court to analyse. For instance, there were issues raised about the list of 43 employees purportedly being in the applicant's employ as not being a statement of confirmation that they were real persons working there. The court agrees with the interveners' contention that the list was not detailed enough, such as there was no mention of their designation and salaries, EPF and SOCSO contributions, apart from their names and identity card numbers listed. What were the proposed plan for restructuring, what were the projection and goals and how would the target be achieved? These questions have not been answered in the applicant's own affidavit.

[27] The only audited financial statement exhibited was for the year 2018 (encl. 2) which showed from a profit of RM4,703,307 in 2017, the applicant suffered losses in 2018 where income was -RM2,195,872. The total liabilities of the applicant was approximately RM25 million. There was no audited financial statements for the years 2019, 2020 and 2021. No one in the country escaped the strict implementation of the Movement Control Orders of 2020 and 2021, including transportation and logistics companies that would have been badly hit by the strict movement control orders, apart from certain industries that had been spared due to connection with supplies of food and medicinal and healthcare items. This was admitted in the applicant's encl. 2. But the burden of proof is on the applicant and it has not discharged the burden to the court's satisfaction in respect of the questions above.

[28] The applicant in encl. 2 stated:

> 9. Kedudukan kewangan Pemohon menurut Laporan dan Penyata Kewangan terkini yang telah diaudit bagi tahun kewangan berakhir 31/12/2018 adalah seperti berikut:
>
> | Aset Bukan Semasa (RM) | Aset Semasa (RM) | Liabiliti Bukan Semasa (RM) | Liabiliti Semasa (RM) |
> |---|---|---|---|
> | 25,157,477.00 | 5,876,915.00 | 16,797,707.00 | 8,957,060.00 |
>
> [Kini dilampirkan dan ditunjukkan kepada saya sesalinan Laporan dan Penyata Kewangan Pemohon bertarikh 31/12/2018 dan ditandakan sebagai eksibit "G2"]
>
> **C. Ketidakmampuan Pemohon Untuk Membayar Hutang**
>
> 10. Saya sesungguhnya menyatakan bahawa Pemohon sedang mengalami masalah kewangan dan kini berada dalam tekanan kewangan untuk meneruskan operasi perniagaannya dan juga pada masa yang sama Pemohon diperlukan untuk meneruskan dengan memenuhi komitmen kewangannya.
>
> 11. Tambahan pula, kesan pandemik COVID-19 dan kemerosotan ekonomi global telah memberi impak yang teruk dalam pelbagai industri seperti industri penjualan pemborong barangan pengguna di mana ia menjejaskan operasi dan proses perniagaan Pemohon dengan teruk semasa MCO 1.0, MCO 2.0, CMCO, MCO 3.0, FMCO dan PPN.
>
> 12. Dengan impak-impak seperti di atas, saya sesungguhnya menyatakan Pemohon menghadapi cabaran besar untuk meneruskan operasi perniagaannya dengan tekanan untuk menghormati dan memenuhi komitmen kewangan kepada pemiutang-pemiutang.

13. Pada masa ini, saya sesungguhnya menyatakan terdapat tindakan-tindakan telah dimulakan terhadap Pemohon di mana butirannya adalah seperti berikut:

...

29. Saya sesungguhnya menyatakan sekiranya Pemohon digulungkan, terdapat kemungkinan yang sangat rendah untuk pembayaran semua keberhutangan kepada pemiutang-pemiutang.

30. Selepas dinasihati oleh peguamcara Pemohon, saya sesungguhnya menyatakan kepentingan awam dapat ditegakkan sekiranya Perintah Pengurusan Kehakiman dibenarkan oleh Mahkamah Yang Mulia ini kerana Pengurus Kehakiman merupakan pegawai mahkamah dan tindakan-tindakan Pengurus Kehakiman adalah untuk menjaga kepentingan pemiutang-pemiutang.

[29] In the *Biaxis Case*, some figures were given in support of the application for JMO. Even then the court in that case decided the applicant had not put forth a tangible proposal and all that was appended to support the proposal was the "white knight's" (Vizione) letter of intent and a draft indicative term sheet. The learned Judicial Commissioner decided that they were both vague, speculative and scant on details. Vizione's letter did not even indicate the capital injection that they were prepared to take. The court continued:

> [51] The draft indicative term sheet was not even dated or signed off by nominated judicial manager (or anybody for that matter). Even they, they were more concerned with the restructuring of the debt – which basically means diminishing the creditors' rightful entitlements in terms of quantum time and terms of payment – than Better Realisation to improve the creditors' lot, which is what the court is really concerned with.
>
> ...
>
> [54] Unfortunately the figures quoted were not substantiated or verified. There was no satisfactory explanation of the rationale of the proposal and how the proposal would achieve Better Realisation, in particular, I find it quite disconcerting that the Applicant were able to surmise such luring figures for Better Realisation when Vizione have not even indicated the capital injection that they are prepared to take.

[30] Comparing the facts of the present case to the *Biaxis Case*, the court finds that the circumstances are similar and in fact in this case, the applicant merely qualifies itself that it reserves the right to obtain the advice of the JM that would be appointed by the court as follows:

32. Setakat ini, saya sesungguhnya menyatakan Pemohon merizabkan hak-hak untuk mendapatkan nasihat daripada Pengurus Kehakiman yang arif sehingga Pengurus Kehakiman telah dilantik oleh Mahkamah Yang Mulia ini dan seterusnya memberi satu rancangan-rancangan melalui Penyata Cadangan yang berdaya maju

untuk menjamin kelangsungan kewujudan dan/atau pemulihan (rehabilitation) Pemohon sebagai suatu operasi yang berterusan (going concern) selepas meneliti keadaan kewangan Pemohon.

Regardless, the applicant has not made a full and frank disclosure before this court in respect of its financial situation due to the fact that the current audited statements or financial statements of the applicant, including for the years 2019, 2020 and 2021 has not been exhibited before this court.

[31] It can be seen from the exhibits in encl. 2 that the applicant did not pay its debts and therefore, the numerous lawsuits against it and quite a number were judgments in default obtained by its creditors. However, it is not enough to state that it has satisfied the provision of s. 405(1) without more by just making a sweeping statement of its inability to pay off its debt and then try to obtain the court's protection from the legal suits it was facing. Then what about the rights of the secured creditors to obtain legal remedy against the applicant? Coming back to that provision, parts (a) and (b) are to be read disjunctively by the court in determining whether the requirements of s. 405(1) has been met. Unfortunately, without more details of the applicant's restructuring the company had not been able to show not even one of the three limbs in s. 405(1)(b) to enable the court to exercise its power judiciously in its favour; *Goldpage Assets Sdn Bhd v. Gan Kam Seng & Ors* [2020] 1 LNS 2283; [2021] 9 MLJ 618.

[32] The court finds that the Guiding Principles on Expectations as laid down in the *Biaxis Case* are useful in determining whether to allow or dismiss the application. In that case, the court stated the following:

Guiding Principle On Expectations

[25] Having said that, there must be some core guiding principles. I find the following to be a useful guide: the applicant and/or the nominated judicial manager should:

(a) demonstrate that the application and proposal is *bona fide*;

(b) demonstrate that they have used their best efforts:

(i) to gather and verify all the relevant information, especially financial information;

(ii) to get the proposal as close as possible to its final form; and

(iii) to secure the commitment of parties who are injecting money in the proposal, if any; and identify issues that are still outstanding;

(c) explain the rationale of the proposal and how it will achieve its goal within the given time frame;

(d) make full and frank disclosure of:

(i) material risk that may lead to the creditors ending up in a less advantageous position;

(ii) all previous applications for judicial management applications and their respective outcomes; and

(iii) any other relevant matters.

[26] Finally, the applicant should state that they consider that there is a reasonable probability of achieving the goals – this is the pre-conditions for his application; and the nominated judicial manager should state that he considers the proposal is likely to achieve the goals – this is the very least that he, the expert, would have to say if he is to persuade the court to share his confidence.

[33] Unfortunately, the applicant's encls. 2, 70, 71, 72, 73, 74 and 75 fell short of the guidelines abovementioned. The affidavits were bereft of the details necessary for this court to decide in its favour. Borrowing from the words of the learned Judicial Commissioner in the *Biaxis Case*, it is not only the applicant who have to rely on the expertise of the nominated judicial manager for guidance. The court in considering whether the proposal is likely to achieve survival and/or better realisation, would similarly have to rely on the nominated JM's expertise for guidance. His evidence is thus crucial to the application. In this case, there was already a proposed JM named in the application. However, the court did not see any affidavit or an expert report exhibited by the proposed JM and therefore, no satisfactory explanation on the rationale of the averments by the applicant and how it would achieve the goals. Without his expert opinion and verification of the material issues, and ultimately without his expert opinion that he considers the proposal is likely to achieve the goals ('expert opinion'), there was nothing credible before the court for it to even consider that the proposal would be likely to achieve its goals. As such, the averments lacked credibility. Similar to the *Biaxis Case*, the court finds that even the pre-conditions for making the application – that the applicant considers there is a reasonable probability of achieving the goals – is questionable. In these circumstances, the evidence adduced fell far short of what it would take to persuade this court to allow the application to issue a JMO.

[34] On the next issue, the applicant submitted in encl. 81 that there was no dispute that all the interveners here were the hire-purchase creditors. However, in order to exert the veto power as provided in s. 409 of Companies Act 2016, the interveners must prove that they were the secured creditors or creditors that can appoint any receiver and manager. The applicant questioned whether the hire purchase creditors were considered as secured creditors as stated in the Companies Act 2016. However, the Act *per se* is silent in the definition of secured creditors. Counsel tried to persuade the court that in order to draw an analogy of the meaning of 'secured creditor', it submitted the case of *Re Mohamad Supardi Md Noor; ex p Public Finance Bhd* [2004] 4 CLJ 646 whereby the High Court held that:

A [1] The car fell within the definition of "property" under s. 2 BA. However, to resolve whether it belonged to the JD, the nature of the hire-purchase agreement should be resorted to. Based on the meanings given to the terms "hire-purchase agreement", "owner", "hirer" and "hire-purchase price" in s. 2 Hire Purchase Act1967 ('HPA'), the car was not the property of the JD until the hire purchase price was fully settled. Even
B though the registration card of the car named the JD as the registered owner, this fact did not make him the legal owner. As the car was not the property of the JD but the property of the JC, there could be no mortgage, charge or lien by the JC over it. Hence, the JC was not a secured creditor for the purposes of s. 5(2) BA. The JC could not surely take its own property as security. (pp. 650 g-h, 651a-h & 652 d-g)

C [2] An option to purchase is "property" under s. 48(1)(b)(i) BA, only if it is exercisable, *ie*, if the hire purchase is fully settled. Unless and until the hire-purchase price is fully paid, the debtor is incapable of exercising any power over the option to purchase. The debtor definitely could not exercise his power over something that he did not have. In the present
D case, the JD did not exercise his option to purchase as he had not settled the full payment of the hire purchase price. Hence, the JC did not fall under the category of a secured creditor in s. 2 BA. Accordingly, s. 5(2) BA was inapplicable. Even if the option to purchase is property, there can be no charge over the said option as such option cannot be disposed of or realised to settle a debtor's debt. (pp. 653 h, 654 a-h & 655 a-c)

E **[35]** Based on the authority cited above, it was submitted clearly the hire purchase creditors could not deem themselves as the secured creditors because at all material times, the vehicles belonged to them under the hire purchase. As such, it was submitted that the interveners here which were the
F hire purchase creditors could not be treated as the secured creditors. Thus, they did not possess any veto power as stipulated in s. 409 of the Companies Act 2016 to deny the application's application for an order for judicial management.

[36] Then, counsel continued:

G 47. Without prejudice to the above submissions, it is not disputed that Ambank and RHB Bank are the secured creditors.

48. Based on the current position of law, it is also not disputed that secured creditors are having the power to oppose the application for an order of judicial management unless there is public interest justification
H pursuant to Section 405(5) of the Companies Act 2016

49. In the case of *Dalam Perkara Wellcom Communications (NS) Sdn Bhd & Satu Lagi* [2019] 1 CLJ 393 at page 399 whereby the Court held that notwithstanding any objection by a secured creditors, the Court can still allow a Judicial Management Order to the Applicant if the Court thinks
I that the public interest required it ...

...

> 50. Similarly, in the case of *Leadmont Development Sdn Bhd v. Infra Segi Sdn Bhd and Another Case* [2018] 10 CLJ 412 at page 420, where the court held that even if the court is satisfied that the making of the Judicial Management Order is not likely to achieve one or more of the purposes as set out in Section 405(1)(b) of the Companies Act 2016, the court is vested with an overriding power to make the Judicial Management Order "if it considers the public interest so requires."

[37] It appeared that the applicant approbated and reprobated on this issue of "secured creditors". Prior to the hearing of encl. 1, the applicant did not object to the application by the six interveners and only objected to the seventh proposed intervener which later withdrew its application to intervene. Hence, the court allowed the six interveners to intervene in this proceeding. In contrast to the authority cited by the applicant, the court agrees with the authority cited by the interveners on this issue, namely, *M Hashimi Ibrahim v. Asia Commercial Finance (M) Bhd* [2002] 5 CLJ 25; [2001] 4 MLJ 67 where the learned judge held:

> Therefore, in my judgment, the option to purchase in a hire purchase agreement is itself a property. This accords well with the definition of 'property' in the Act. Thus in the instant case, even though no property in the truck has passed to the appellant debtor, the option to purchase the truck by the appellant debtor is his interest in the truck. As such, it is properly defined under s. 2 of the Act. *Since the endorsement of ownership claim has not been withdrawn and cancelled, the respondent creditor must be holding on to the ownership claim of the truck as a security for the debt due to the respondent creditor from the appellant debtor. By adopting the arrangement of a hire purchase agreement and endorsing the ownership claim by the respondent creditor ('hak milik dituntut oleh') on the registration card, the respondent creditor, which is the financier owner of the truck, is therefore a secured creditor under the Act.*
>
> (emphasis added)

[38] The Federal Court in the case of *Asia Commercial Finance (M) Bhd v. JB Precision Moulding Industries Sdn Bhd (In Liquidation)* [1996] 2 CLJ 547; [1996] 2 MLJ 1 decided that the definition of a "secured creditor" under s. 2 of the Bankruptcy Act 1967 (now Insolvency Act 1967) was applicable to the Companies Act 1965 (now Companies Act 2016). Therefore, the applicant's argument that the interveners were not secured creditors at this late stage of the proceedings did not hold water. The court viewed that this stand was taken purely to block the "veto" of secured creditors as provided for under s. 409 of the 2016 Act and delay the proceedings in the 23 civil suits filed earlier. Having considered the submissions and the documents in this application, I am of the view the interveners are secured creditors, except AmBank Islamic, and therefore there is no discretion under the law that the application can be allowed s. 409(b).

[39] It is trite law that secured creditors have the power to oppose the application for an order of judicial management unless there is public interest justification pursuant to s. 405(5) of the 2016 Act. Counsel for the applicant

A referred to the case of *Re Bintan Lagoon* [2005] SGHC 151 whereby the High Court of Singapore held: "The question whether the public interest so requires may perhaps best be answered by considering the likely consequences of not making a judicial management order. Will a refusal to make such order lead or allow the dismemberment or collapse of a company
B whose failure will have a serious economic or social impact?"

[40] Therefore, it was submitted that granting a JMO to the applicant would serve the public interest. If the applicant was not allowed to be placed under Judicial Management, there was a high probability that the company would be wound up and all the employees of the applicant would be
C unemployed (refer to exh. G3, encl. 70; exh. G2, encl. 71; exh. G2, encl. 72; exh. G1, encl. 73; exh. G3, encl. 74; and exh. G1, encl. 75). Lastly it was the applicant's contention that judicial management would benefit the company and its members by protecting them from a forced liquidation of the creditors of the applicant. Unsecured creditors of the applicant may also
D benefit if the company's assets are sufficient to pay off the secured debts. The applicant submits that the opportunity to rehabilitate the company will definitely increase an unsecured creditor's chances of getting paid compared to a "piece-meal" fire-sale of the assets.

[41] The applicant submitted notwithstanding any objection by a secured
E creditor, the court can still issue a JMO to the applicant if the court thinks that the public interest required it. However, the interveners countered that the case laws had decided what was considered to be "public interest". The court again refers to the *Biaxis Case* in respect of the court's determination of "public interest" that would enable the court to exercise its discretion
F under s. 405(5)(a) of the 2016 Act:

> [32] Given the implication of public interest in this context – it overrides all the checks and balance for the granting of a judicial management order – public interest is to be interpreted restrictively and should only apply in the most exceptional of circumstances. Generic reasons associated with
G wound up companies such as loss of employment, uncompleted contracts, etc do not fall within the meaning of public interest.
>
> [33] *If I may be permitted to illustrate 'exceptional' by way of a hypothetical example of what I would consider as public interest. As our nation, and indeed the world, struggles to contain the COVID-19 pandemic, if a company who alone possesses the vaccine for the virus makes an application for a judicial management order, the court*
H *may in such exceptional circumstances consider that public interest requires that the judicial management order be made.* (emphasis added)

[42] In the case of *Alam Teknokrat Sdn Bhd v. Affin Islamic Bank Bhd* [2022] 1 LNS 2190; [2022] MLJU 2250, the Kuala Lumpur High Court held:

I > [12] With the greatest of respect, I would like to quote *CIMB Islamic Bank Berhad v. Wellcom Communications (NS) Sdn Bhd & Anor* [2019] MLJU 148 and I adopt the same for the purpose of my decision in this OS herein where the Court of Appeal held:

> [9] The effect of making a judicial management order in relation to an insolvent company which may have no prospect of recovering money or assets within a reasonable time indeed may be very drastic. Thus, the court's consideration at all stages, that is to say from the date the application is filed and from the date of the order, if any is given, must be based on strict proof and evidence and not merely surmise and conjecture to ensure creditors are not defrauded by sympathy evoking stories of insolvent companies.
>
> [13] For the record, I further find no element of public interest applicable based on the facts of the matter before me and that the clientele of the Applicant *per se* does not in my opinion justify the public interest element as the Applicant is not the only company in the country who is able to provide the services mentioned. In the circumstances, I hold that the Applicant has failed to satisfy this Court that the requirements under section 404 and/or 405 of the Companies Act 2016 have been met.
>
> [14] This Court hereby dismisses the OS with costs.

[43] Based on the case laws cited above, In the present case, this court agrees with the interveners there was nothing special about the applicant company which was an ordinary transportation company. Loss of employment is not a public interest consideration as all wound up companies will claim that. Moreover, there would be termination benefits to be paid to the affected employees. The affidavits in support of the application did not elaborate whether it would cause serious economic or social impact.

Conclusion

[44] Premised on the above considerations, the court dismissed the application with costs.